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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DUCAN FANFAN

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

2. If the answer to the first question is "yes," the following question is presented: Whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.

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PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari before judgment in a case pending on appeal to the United States Court of Appeals for the First Circuit.

OPINION BELOW

The sentencing proceedings in this case (App., *infra*, 1a-13a) are not reported.

JURISDICTION

The judgment of the district court (App., *infra*, 16a-21a) was entered on June 30, 2004. The notice of appeal (App, *infra*, 27a) was filed on July 16, 2004. The case was docketed in the court of appeals on July 19, 2004, as No. 04-1946. App., *infra*, 27a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

CONSTITUTIONAL, STATUTORY, AND GUIDELINES PROVISIONS INVOLVED

The relevant constitutional, statutory, and Sentencing Guidelines provisions involved are set forth in an appendix to the petition. App., *infra*, 28a-63a.

STATEMENT

1. The underlying facts

On June 11, 2003, respondent was charged in an indictment in the District of Maine with conspiring to distribute and to possess with intent to distribute 500 or more grams of cocaine, in violation of 21 U.S.C. 846. The maximum penalty for that offense is life imprisonment. In connection with an ongoing investigation, a narcotics agent arrested Donovan Thomas, who had previously delivered cocaine to an informant and was returning to collect money for the delivery. Thomas agreed to cooperate and stated that respondent was his source of supply for the cocaine. Thomas arranged to purchase additional cocaine from respondent. When respondent arrived at a Burger King restaurant to complete the transaction, he was arrested. Agents found 1.25 kilograms of cocaine and 281.6 grams of cocaine base in respondent's vehicle. Presentence Report (PSR) 6.

2. The district court proceedings

After a jury trial, respondent was found guilty. In response to the question on the verdict form, "Was the amount of cocaine 500 or more grams?," the jury checked "Yes." App., *infra*, 15a.

At sentencing on June 28, 2004, the court found that the evidence supported the calculation in the PSR of drug quantity (2.5 kilograms of cocaine powder and 281.6 grams of cocaine base) as relevant conduct attributable to respondent under the Sentencing Guidelines. Sent. Tr. 80; see PSR 7-8. That resulted in a base offense level of 34 under Sentencing Guidelines § 2D1.1(c)(3). App., *infra*, 2a. The court found that a two-level enhancement under Guidelines § 3B1.1(c) for defendant's role as an organizer, leader, manager, or supervisor in the criminal activity was also warranted. *Ibid.* The court determined that respondent's criminal history category was I, producing a sentencing range under the Guidelines of 188-235 months of imprisonment. *Ibid.*

Before imposing sentence, however, the court considered the effect of this Court's decision in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), rendered four days earlier. The court declined to await further briefing on that subject, App., *infra*, 3a, noting that, "if th[e] reasoning of *Blakely* applies here, all the jury verdict permits us to conclude in this case is that [respondent] was guilty of a conspiracy and that it involved at least 500 grams of cocaine powder." *Id.* at 5a. On that basis, the court found that respondent would have a base offense level of 26—the level applicable to offenses involving 500 grams of cocaine—and that no other Guidelines enhancements could be justified. At that level, the court found that respondent's sentencing range would be 63-78 months of imprisonment—"[i]n other words, five or six years instead of 15 or 16 years." *Id.* at 6a. The court concluded that "it is unconstitutional for [the court] to apply the federal guideline enhancements in the sentence of [respondent]" and that "[t]o do so would unconstitutionally impinge upon [respondent's] Sixth Amendment right to a jury trial as explained by *Blakely*." *Id.* at 11a. The court sentenced respondent to 78 months of imprisonment, the

maximum sentence permissible under the Guidelines range the court had found applicable. *Id.* at 13a.

The government filed a motion to correct sentence under Federal Rule of Criminal Procedure 35(a). App., *infra*, 23a-26a. The government argued that the court had committed clear error in concluding that this Court's decision in *Blakely* applies to the federal Sentencing Guidelines. The government also argued that the court had committed clear error "by severing out sections of the Guidelines that it believed violated the principles of *Blakely*, and applying the remaining sections." *App., infra*, 23a. The government explained that "the Guidelines cannot constitutionally be applied piecemeal as the Court did at [respondent's] sentencing," because "[s]uch an application distorts the operation of the sentencing system in a manner that was not intended by Congress or the United States Sentencing Commission." *Id.* at 24a. The court denied the motion. *Id.* at 22a.

3. Proceedings on appeal

On July 16, 2004, the government filed a notice of appeal to the United States Court of Appeals for the First Circuit. App., *infra*, 26a. The court of appeals has jurisdiction pursuant to 18 U.S.C. 3742(b). The government's notice of appeal was timely filed within the 30 days allowed by Federal Rule of Appellate Procedure 4(b)(1)(B). The appeal was docketed in the court of appeals on July 19, 2004, as No. 04-1946. App, *infra*, 27a. The case is therefore "in the court[] of appeals" within the meaning of 28 U.S.C. 1254. See Robert L. Stern, et al., *Supreme Court Practice* § 2.4, at 75 (8th ed. 2002).

REASONS FOR GRANTING THE PETITION

This Court's decision in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), has profoundly unsettled the federal criminal justice system. *Blakely* held that a Washington state sentence was imposed in violation of the Sixth Amendment jury-trial right because the sentencing judge was permitted to find an aggravating fact that authorized a higher sentence than the state statutory guidelines system otherwise permitted. 124 S. Ct. at 2537-2538. The Court noted that "[t]he Federal Guidelines are not before us, and we express no opinion on them." *Id.* at 2538 n.9. The Court's decision in *Blakely*, however, has "cast a long shadow over the federal sentencing guidelines." *United States* v. *Booker*, 2004 WL 15385858, at *1 (7th Cir. July 9, 2004), petition for cert. pending (filed July 21, 2004). In particular, it has roiled the federal courts by raising doubts about the constitutionality of routine Guidelines sentencing procedures, employed for 15 years since *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989), under which sentencing judges find the facts necessary to arrive at a Guidelines sentencing range for each defendant.

The government is today filing petitions for certiorari in this case and in *Booker*, *supra*, as companion vehicles for this Court's consideration of the implications of *Blakely* for federal sentencing. Further review is warranted in both cases, on an expedited basis, in order to provide authoritative answers to the questions presented and to provide guidance on how to conduct the thousands of federal criminal sentencings that are scheduled each month.

A. Review Of The Implications Of *Blakely* For Federal Criminal Justice Is Warranted

The government's petition for certiorari in *Booker* recounts in detail the conflict in the circuits that has arisen on whether *Blakely* applies to the Guidelines. *Booker* Pet. 11-14. It also explains the importance of the second question presented in both cases: *i.e.*, the issue of how, if the rule in *Blakely* applies to the federal Sentencing Guidelines, sentencing is to be conducted in federal cases in which *Blakely*'s interpretation of the Sixth Amendment invalidates application of certain Guidelines provisions. *Booker* Pet. 14-19.

The resolution of those questions cannot be delayed. Without answers to those questions, federal criminal justice will remain in a state of confusion about the manner in which federal sentences are to be determined in the thousands of criminal cases that go to sentencing each month. If this Court holds that *Blakely* does not apply to the Guidelines, then courts will uniformly return to the familiar Guidelines sentencing procedures that prevailed before *Blakely*. Alternatively, if this Court holds that *Blakely* does apply to the Guidelines, the proper conduct of sentencing turns on the answer to the second question: whether the Guidelines may continue to be used in cases in which judicial factfinding required by the Guidelines would violate the Sixth Amendment. That issue of severability, and of the procedural implications of *Blakely*, is of considerable consequence to sentencing procedures nationwide. A decision from this Court is required to settle the matter.

B. This Case Squarely Presents The Issues Surrounding The *Blakely* Controversy On Which This Court's Guidance Is Needed

This case squarely raises both of the issues presented. The district court determined that *Blakely* applies to the Guidelines. It then imposed sentence based on its conclusion that the Guidelines as a whole could continue to govern federal sentencing, although in a truncated fashion and not in their intended manner. App., *infra*, 1a-13a. The court thus refused to apply Guidelines enhancements for drug quantity and respondent's role in the offense because, the court held, to do so "would unconstitutionally impinge upon [respondent's] Sixth Amendment right to a jury trial as explained by *Blakely*." *Id.* at 11a. On that basis, the court sentenced respondent to 78 months of imprisonment (from a 63-78 month sentencing range), rather than sentencing respondent within the 188-235 months range that it concluded the Guidelines would otherwise require. *Id.* at 7a. The case thus squarely presents both the question whether federal sentencing practice is unconstitutional under *Blakely* and, if so, how sentencing should be conducted.

C. Certiorari Should Be Granted Both Here And In *United States* v. *Booker*

In *Booker*, *supra*, the Seventh Circuit held that *Blakely* applies to the Guidelines and precludes their normal operation in cases in which judicial factfinding would increase the defendant's maximum sentence under the Guidelines. *Booker* Pet. App. 8a-9a. The court then remanded the question of severability and other remedial issues to the district court. *Id.* at 13a. The government's petition for certiorari in *Booker* presents the same questions that are presented here. Because the petition in *Booker* seeks review of a decision

of a court of appeals, it offers the opportunity for review of the issues through the Court's customary certiorari procedure.

In this case, unlike *Booker*, the court of appeals has not yet reviewed the judgment. But this case has the advantage of arising from a decision in which the sentencing court resolved both questions presented in the petition. This case thus provides an appropriate companion to *Booker* for this Court to consider, in a concrete context, the implications of *Blakely* for federal sentencing.

Simultaneous grants of review here and in *Booker* are warranted. Granting certiorari in both cases would protect against any possibility that later impediments to review in one or the other case might prevent timely resolution of the issues. Assurance that the Court will have a vehicle in which to reach and resolve the important issues presented, and thereby reduce or eliminate the uncertainty that is currently ravaging the federal sentencing system, is warranted in light of what one court has called "an impending crisis in the administration of criminal justice in the federal courts." *United States* v. *Penaranda*, 2004 WL 1551369, at *7 (2d Cir. July 12, 2004) (en banc), certification docketed, No. 04-59 (July 13, 2004).

D. A Grant Of Certiorari Before Judgment And Expedited Consideration Is Warranted In The Exceptional Circumstances Of This Case

1. A petition for a writ of certiorari before judgment in a case pending in a court of appeals will be granted "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 11. This case satisfies that strict criterion.

On several occasions, this Court has granted certiorari before judgment when necessary to obtain expeditious resolution of exceptionally important legal questions. Most notably, the Court granted certiorari before judgment in *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989), in which, as in this case, the constitutionality of the federal sentencing scheme was at issue. The Court also granted certiorari before judgment in *Gratz* v. *Bollinger*, 539 U.S. 244, 259-260 (2001); *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981) (Iran hostage agreement); *United States* v. *Nixon*, 418 U.S. 683 (1974) (subpoena to the President); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) (steel seizure case); and *Ex parte Quirin*, 317 U.S. 1 (1942) (President's assignment to a military tribunal of jurisdiction over the trial of belligerent saboteurs).* See generally James Lindgren & William R. Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259. The constitutionality of federal sentencing practice in light of *Blakely* concerns a subject of equal national importance and warrants certiorari before judgment in this case.

2. In light of the urgent need for this Court's resolution of the questions presented and the thousands —or even tens of thousands—of criminal sentencings

* See *Barefoot* v. *Estelle*, 463 U.S. 880 (1982) (certiorari before judgment to decide standards governing stay of execution pending litigation of habeas petition); *Clark* v. *Roemer*, 501 U.S. 1246 (1991) (granting certiorari before judgment and summarily vacating and remanding case for further consideration in light of intervening Supreme Court decision). In addition to *Gratz*, the Court has granted certiorari before judgment in other cases where cases presenting similar issues had already been accepted for review. See, *e.g.*, *Taylor* v. *McElroy*, 358 U.S. 918 (1958); *Bolling* v. *Sharpe*, 344 U.S. 873 (1952); *Porter* v. *Dicken*, 328 U.S. 252, 254 (1946).

that will be thrown into doubt until such resolution can be achieved, this Court should expedite consideration of the petition and, if review is granted, the case on the merits. The need for expedition is so great that this Court should set a timetable that permits argument to be held before the Court's scheduled argument sessions in the October 2004 Term. The government today is filing a motion for expedited consideration in this case and in *Booker*, *supra*, proposing schedules for the Court's hearing of the cases. The motion proposes a schedule under which the Court would order responses to the petitions to be filed in time for this Court to decide whether to grant certiorari by August 2. If certiorari is granted on that date, the government proposes that the Court give each side two weeks for its principal brief on the merits (the government's briefs would be due on August 16, respondents' briefs due on August 30). The government's reply briefs would be due on September 8, and the Court could then hear oral argument on September 13. That schedule would permit the Court to return a degree of stability to the federal sentencing system at the earliest possible date. An alternative schedule would permit argument on the first day of oral argument in the October 2004 term.

CONCLUSION

The petition for a writ of certiorari should be granted.

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JULY 2004

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MAINE

Docket No. 03-47-P-H
UNITED STATES OF AMERICA

v.

DUCAN FANFAN, DEFENDANT

TRANSCRIPT OF PROCEEDINGS

Pursuant to notice, the above-entitled matter came on for Sentencing Hearing before the HON. D. BROCK HORNBY, in the United States District Court, Portland, Maine, on the 28th day of June, 2004, at 9:36 a.m.

APPEARANCES:

For the Government:

Helene Kazanjian, Esq.

For the Defendant:

Bruce Merrill, Esq.
Rosemary Curran Scapicchio, Esq.

* * * * *

[84]

Let me make sure I haven't missed any issues before I make the guideline findings. As for arguments as to whether it was properly alleged, whether these ele-

ments of sentencing were properly charged in the indictment or proven beyond a reasonable doubt at trial, I reserve those issues for my Blakely determination.

And I do find in accord with the Colon-Solis case that the amounts here in fact all came from this defendant so [85] these are immediately attributable to him. I make that finding in addition to the jury verdict finding the scope of the conspiracy.

So as a result, the guideline findings are that the base offense level is 34 as established in the presentence report.

I make a two level role enhancement under 3B1.1(c).

And there are no other adjustments, so the total offense level is 36.

Criminal History is Category I.

The guideline prison range therefore is 188 to 235 months.

The fine range is $20,000 to $200,000.

And the supervised release term is four to five years.

Now obviously, you have preserved all your objections, but are there any other errors or omissions in the findings other than what you've previously argued, any for the government?

MS. KAZANJIAN: No, Your Honor.

THE COURT: For the defense?

MS. SCAPICCHIO: No, Your Honor.

THE COURT: All right. Thank you. That brings us then to the Blakely decision, Supreme Court's decision last week and its impact on guideline sentencing, more

particularly in this case where we have a jury verdict, but [86] as yet no sentence.

* * * * *

[95]

THE COURT: The non lawyers in the courtroom probably have wondered what the lawyers and I have been talking about with recurring reference to *Blakely*.

Last week on Thursday, the United States Supreme Court handed down a decision called *Blakely v. Washington* in which they, the majority, the court, that is, basically invalidated the state of Washington's sentencing procedures. And ever since Thursday morning, Judges and lawyers and law professors and newspapers and other commentators have been debating what it means for sentencing generally in the United States in a variety of state courts as well as what it means for the Federal Sentencing Guidelines. And that's why we have continually referred to it and what its impact might be.

I am not going to await further briefing, it would be I think unfair to this defendant at this point to continue to delay his sentence. He has been convicted now since early last October. I'm aware as I may have said earlier that being confined in a temporary state institution is not the best position even for someone who has been convicted, but rather, there's a desire to get a final assignment to the federal system where there are programs that can be of an [96] advantage rather than simply being housed temporarily in what's basically a

rented space that the Marshal Service obtains from our local facilities without a lot of programs available.

The lawyers and Judges have had the decision since Thursday, so we've had time to deliberate upon it. I'm not suggesting that more sophisticated arguments can't be provided over the weeks and months ahead, undoubtedly there will be, but they can be addressed in the Court of Appeals.

I think that as the trial Judge, sentencing Judge, my obligation is to go ahead and do the best I can with the Supreme Court decision. This case itself has already had at least a couple of rounds of sentencing briefing, and I think it would not be appropriate to delay further. So I'm going to go ahead and rule based upon my understanding of what the *Blakely* decision means.

As Ms. Kazanjian pointed out, *Blakely* does not deal directly with the federal guidelines. It dealt with the Washington state system. And according to Footnote 9 of the majority opinion, the court said that "Federal Guidelines are not before us, and we express no opinion on them." That's a direct quote.

Of course as a subordinate federal Judge, I must faithfully follow the logic and principle of the Supreme Court, and since this is its most recent pronouncement, if [97] it's contrary to earlier First Circuit decisions or even earlier Supreme Court decisions, I must follow it in preference to those earlier statements. So I have to examine carefully what it is that *Blakely* tells us.

According to *Blakely*, and I'm quoting directly here now, "Our precedents make clear, however,

that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

"In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority."

That's the end of the quotation, I've admitted—I've omitted the various citations.

Moreover, the *Blakely* court in adhering to the principles of its earlier *Apprendi* decision states at another point, and I quote, "*Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended." That's the end of that quotation.

[98] And one other quotation near the end of the opinion, "As *Apprendi* held, every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment."

Now if that reasoning of *Blakely* applies here, all the jury verdict permits us to conclude in this case is that Mr. Fanfan was guilty of a conspiracy and that it involved at least 500 grams of cocaine powder.

The verdict from the jury permits no conclusion as to how much above the 500 grams the conspiracy involved. The jury verdict does not permit us to reach a conclusion about crack cocaine. Crack cocaine was not even charged in the indictment. And the verdict does not permit us any conclusion as to this defendant's leadership role in the conspiracy.

I certainly have views on those subjects, and I've made my findings earlier this morning. After all, I sat through the trial, I heard the testimony. I've read the presentence report. I heard the testimony at the sentencing hearing today as well as at trial.

And I do have views about that which I've expressed in my guideline findings, but if I take solely what I can infer or deduce from the jury verdict, instead of the guideline prison range of 188 to 235 months, based on a total offense level of 36, and a Criminal History Category of I, I would [99] take solely the 500 grams of cocaine which is a base offense level of 26. I would not be able to make any enhancements available if I looked only at the jury verdict.

So with a total offense level of 26, and a Criminal History Category of I, the prison range would be 63 to 78 months. In other words, five or six years instead of 15 or 16 years.

So what does *Blakely* require me as a sentencing Judge to do. The dissenting Justices in *Blakely*, those who disagreed with the court's holding, as I say disagreed with the holding, but they certainly agreed with the majority on the consequences. According to Justice O'Connor, I'm quoting, "Under

the majority's approach," that's the court's approach, "any fact that increases the upper bound on a judge's sentencing discretion is an element of the offense. Thus, facts that historically have been taken into account by sentencing judges to assess a sentence within a broad range—such as drug quantity, role in the offense, risk of bodily harm—all must now be charged in an indictment and submitted to a jury." End of quote.

According to Justice Breyer, who wrote a separate dissent, I'm quoting, "Thus, a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the way in which the offender carried out that crime." End [100] of quote.

I conclude that without those jury findings here, in other words, beyond the conspiracy and the 500 grams of powder, I may not increase the sentence above the 63 to 78 month range to the guideline range I found earlier of 188 to 235 months.

I point out that that conclusion, although perhaps surprising to those of us who have been laboring under guideline sentencing for these many years, that conclusion would not bother the *Blakely* court.

I quote again from the majority opinion, "The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,' rather than a lone employee," that's me, the Judge, "of the State." End of quote.

And of course, here we're talking about much more than three years.

I have considered this matter at great length, and I see no basis upon which to avoid the reasoning of *Blakely* just because I'm applying federal guidelines, rather than Washington state guidelines.

Indeed, I note that the Solicitor General of the United States, the top government lawyer for the Supreme Court, [101] expressed his concern to the Supreme Court that a holding such as the court came up with in *Blakely* would jeopardize the Federal Sentencing Guidelines.

In Footnote 9 of the opinion, the very footnote where the court said it was not making a ruling one way or the other on the guidelines, the court pointed out, "The United States, as amicus curiae, urges us to affirm. It notes differences between Washington's sentencing regime and the Federal Sentencing Guidelines but questions whether those differences are constitutionally significant."

And I proceeded to look at the Solicitor General's brief over the weekend, and I discovered that in the brief, he stated "If the 'facts reflected in the jury verdict alone' are the elements of the offense, petitioner's theory would mandate the application of *Apprendi* to any facts, other than the offense elements, that increase the defendant's punishment." And of course that's precisely what the court did in *Blakely*.

Returning back to the quotation from the brief, "Such a rule would have profound consequences for the federal Guidelines. As explained more fully below, facts other than the elements of the offense

enter into almost all of the calculations under the Guidelines, beginning with the most basic calculations for determining the offender's presumptive sentencing range. A decision in favor of [102] petitioner," Solicitor General goes on, of course that's exactly what *Blakely* did, he says "could thus raise a serious question about whether *Apprendi* applies to myriad factual determinations under the Guidelines." End of quotation.

And later in the brief he said that despite some differences between the federal scheme and the Washington scheme, such as the ones that Ms. Kazanjian has properly referred to, the location of the Commission, the third branch, its composition, its role, he went on to say, and I quote, "The Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit. Congress has in fact exercised its authority to amend the Guidelines. Moreover, the Sentencing Commission exercises authority delegated by Congress, and the Guidelines are binding legislative rules. Thus, it is not entirely clear that the administrative nature of the Guidelines will insulate them from *Apprendi*." End of quote.

So although the *Blakely* court did not address the federal guidelines, I do conclude that the Solicitor General was exactly correct in his briefing that a decision like Blakely applies to the Federal Guidelines.

The Supreme Court said in *Mistretta*, the very first decision handed down under the guidelines where the attack was on separation of powers and unconstitutional delegation, [103] the court in *Mistretta* said, and I quote, "Although Congress

granted the Commission substantial discretion in formulating guidelines, in actuality, it legislated a full hierarchy of punishment—from mere maximum imprisonment, to substantial imprisonment, to some imprisonment, to alternatives—and stipulated the most important offense and offender characteristics to place defendants within these categories." End of quote.

It seems to me that makes the Federal Guidelines exactly comparable to the Washington state scheme in all respects material to the *Blakely* decision.

And finally, although the *Blakely* court said in the footnote I've talked about a number of times now that it was not ruling on the federal guidelines, Justices O'Connor, Breyer, Kennedy, and Chief Justice Rehnquist all agreed that the Federal Guidelines cannot be distinguished.

First I'll quote from Justice O'Connor, she says, "The fact that the Federal Sentencing Guidelines," this is a direct quote, "are promulgated by an administrative agency nominally located in the Judicial Branch is irrelevant to the majority's reasoning. The Guidelines have the force of law, and Congress has unfettered control to reject or accept any particular guideline."

"The structure of the Federal Guidelines likewise does not provide any grounds for distinction. If anything, the [104] structural differences that do exist make the Federal Guidelines more vulnerable to attack." End of quote.

She goes on to talk about the majority's treatment of the state of Washington's guidelines. She says, quote, "suggests that the hard constraints

found throughout chapters 2 and 3 of the Federal Sentencing Guidelines, which require an increase in the sentencing range upon specified actual findings" —excuse me, "specified factual findings, will meet the same fate." End of quote.

According to Justice Breyer, I quote, "Perhaps the Court will distinguish the Federal Sentencing Guidelines, but I am uncertain how." End of quote.

And indeed, I conclude that perhaps the Supreme Court can find a way to explain away *Blakely* in its language and its reasoning, but as a trial Judge and a sentencing Judge, I cannot. I must take it as it is written. I will leave it to higher courts to tell me it does not mean exactly what it says.

Accordingly, following Blakely, I conclude that it is unconstitutional for me to apply the federal guideline enhancements in the sentence of Ducan Fanfan, which is to say, an increase in the drug quantity beyond that found by the jury, or any role enhancement. To do so would unconstitutionally impinge upon Mr. Fanfan's Sixth Amendment right to a jury trial as explained by *Blakely*.

[105] I therefore cannot follow the federal sentencing guidelines in those respects which involve drug quantity and role enhancement. Instead, I'm going to sentence the defendant based solely upon the jury verdict in this case.

I point out I'm not making any blanket decision about the federal guidelines. I'm dealing solely with drug quantity and with role enhancement in the context of the case that went to a jury verdict before a jury trial.

Now there is one other issue here under the *Colon-Solis* case-that I referred to with the lawyers where the First Circuit has said that in the pre *Blakely* environment, following a jury verdict as to the scope of a conspiracy, it's still incumbent on the sentencing Judge to decide how much the individual defendant being sentenced is responsible for under the relevant conduct guidelines.

Here, the jury was asked to define—to find the scope of the conspiracy by way of drug quantity, it was not asked that precise question, but I find that there is no other way to interpret its verdict given the facts, testimony, the evidence that was presented to the jury.

The whole case against this defendant that the jury heard was that he was the sole source of all of the drugs. And so this is not an instance where the jury could have assigned responsibility to this defendant for amounts some other member of the conspiracy had been involved in he had [106] not, instead, the drugs all originated with him.

So if there is a *Colon-Solis* issue here in this post *Blakely* environment such that the juries now in the future will have to be asked to make that decision, I find any error is harmless, that the jury beyond any doubt would have found that this 500 grams of powder was attributable directly to this defendant.

So the guideline range that I will use as I say is the 63 to 78 months.

The fine range for that offense level is 12,500 to $125,000.

The supervised release is four to five years.

I'm going to impose a modest fine below the guideline level because I find he cannot pay the guideline fine, but he can pay a small fine.

I'm going to impose the maximum sentence. He was the ring leader of a significant drug conspiracy. And I'm going to impose the maximum term of supervised release.

And at this time, the defendant will stand for sentencing.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

Docket No. 03-47-P-H

UNITED STATES OF AMERICA

v.

DUCAN FANFAN, DEFENDANT

[Filed: June 11, 2003]

INDICTMENT

The Grand Jury charges:

Beginning in about September 2002 and continuing until in about April 2003 in the District of Maine and elsewhere, defendant

DUCAN FANFAN

knowingly and intentionally conspired with others known and unknown to the grand jury to commit offenses against the United States, that is, to distribute and possess with intent to distribute 500 grams or more of a mixture or substance containing cocaine, a Schedule II controlled substance, in violation of Title 21, United Stated Code, Section 846 and 841(a)(1).

It is further alleged that the penalty provisions of Title 21, United States Code, Section 841(b)(1)(B) apply to the conduct described herein.

A TRUE BILL,

Signature Illigible
Foreperson

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 03-47-P-H-03

UNITED STATES OF AMERICA

v.

DUCAN FANFAN, DEFENDANT

[Filed: Oct. 9, 2003]

JURY VERDICT FORM

1. We, the jury, find the defendant Ducan Fanfan Guilty_____
   (Not Guilty/Guilty)
2. [Answer *only* if you have answered "Guilty" to Question # 1.]

   Was the amount of cocaine 500 or more grams? Yes X No_____

Dated: October 9, 2003

/s/ DONALD R. MALONSON SR.
DONALD R. MALONSON, SR.
Jury Foreperson

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA

v.

DUCAN FANFAN

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:03-CR-47-P-H
USM Number: 02668-038
Entered on Docket: 6/30/2004
Rosemary Curran Scapicchio, Esq. &
Bruce M. Merrill, Esq.
Defendant's Attorney

A TRUE COPY
ATTEST: William S. Brownell, Clerk

By_____
Defendant's Clerk

THE DEFENDANT:

☐ pleaded guilty to count(s) _____
☐ pleaded nolo contendere to count(s) ___ which was accepted by the court.
☐ was found guilty on count(s) (INDICTMENT) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
1 U.S.C. §§ 846 and 41(a)(1) and (b)(1)(B)	Conspiracy to Distribute and Possess with Intent to Distribute 500 or More Grams of Cocaine	April 2003	ONE

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____.
☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

____ is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of material changes in economic circumstances.

June 28, 2004 & June 29, 2004
Date of Imposition of Judgment

_____
Signature of Judge

D. Brock Hornby, U.S. District Judge
Name and Title of Judge

6/30/04
Date Signed

APPENDIX D

DEFENDANT: DUCAN FANFAN
CASE NUMBER: 2:03-CR-47-P-H

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of SEVENTY-EIGHT (78) Months.

☐ The cost of incarceration fee is waived.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district,
- ☐ at _____ ☐ a.m. ☐p.m. on _____.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designed by the Bureau of Prisons.
- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DUCAN FANFAN
CASE NUMBER: 2:03-CR-47-P-H

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.

The Defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

☐ The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at lease two additional drug tests during the term of supervision, but not more than 70 drug tests per year thereafter, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

____ of this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

1. Defendant shall not use or posses any controlled substances or intoxicants; and shall participate in a program of drug and alcohol abuse therapy to the satisfaction of the supervising officer. This may include testing, of not more than 70 tests per year, to determine if the defendant has made use of drugs or intoxicants. Defendant shall pay/co-pay for services provided during the course of such treatment, to the supervising officer's satisfaction.

2. Defendant shall remain continuously employed for compensation to the satisfaction of the supervising officer throughout the period of supervised release.

3. At such times when the Defendant is unemployed or employed part-time, he shall perform up to twenty (20) hours per week of community service at the direction and discretion of the supervising officer.

DEFENDANT: DUCAN FANFAN
CASE NUMBER: 2:03-CR-47-P-H

SUPERVISED RELEASE

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
Totals:	$100.00	$2,000.00	

☐ The court finds that the defendant does not have the ability to pay a fine. The court will waive the fine in this case.

☐ The determination of restitution is deferred until. An *Amended Judgement in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss* $	Restitution Ordered $	Priority or Percentage
TOTALS	$_____	$_____	

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total monetary penalties are due as follows:

A ☐ Lump sum payment of $2100.00 due immediately, balance due
☐ not later than , or
☐ in accordance with ☐ C, ☐ D, or ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal (e.g., weekly, monthly, quarterly) installments of $ over a period of (e.g., months or years), to commence (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal (e.g., weekly, monthly, quarterly) installments of $ over a period of (e.g., months or years), to commence (e.g., 30 or 60 days) after release from imprisonment to a term of supervisor; or

E ☐ Payment during the term of supervised release will commence within (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's abilitu to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Any amount that the defendant is unable to pay now shall be paid in monthly installments, to br initially determined in amount by the supervising officer. Said payments are to be made during the period of supervised release/probation subject always to review by the sentencing judge on request, by either the defendant or the government.

Unless the court has expressly ordered otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defedant names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

☐ The defendant shall pay the cost of prosecution.
☐ The defendant shall pay the following court cost(s):
☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) final principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Criminal No. 03-47-P-H

UNITED STATES OF AMERICA

v.

DUCAN FANFAN, DEFENDANT

ORDER ON GOVERNMENT'S MOTION TO CORRECT SENTENCE

The motion is **DENIED**. This is not the type of "arithmetical, technical or other clear error" for which Fed. R. Crim. P. 35(a) is designed. *See* 1991 Advisory Committee Note. The issues presented by the motion are for the Court of Appeals.

So ORDERED.

DATED THIS 8TH DAY OF JULY, 2004

/s/ D. BROCK HORNBY
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Criminal No. 03-47-P-H

UNITED STATES OF AMERICA

v.

DUCAN FANFAN

MOTION TO CORRECT SENTENCE

NOW COMES the United States of America, by and through its counsel Paula D. Silsby, United States Attorney for the District of Maine, and Hélène Kazanjian, Assistant United States Attorney, and hereby moves pursuant to Rule 35(a) of the Federal Rules of Criminal Procedure for the Court to correct the sentence imposed on Defendant Fanfan on June 27, 2004. In imposing sentence on Defendant Fanfan, the Court committed clear error by ruling that the recent Supreme Court decision *Blakely v. Washington*, 2004 WL 1402697, No. 02-1632, applies to the United States Sentencing Guidelines. The Court also committed clear error by severing out sections of the Guidelines that it believed violated the principles of *Blakely*, and applying the remaining sections.

The position of the United States, as argued at defendant Fanfan's sentencing, is that the rule announced in *Blakely* does not apply to the United States Sentencing Guidelines, and that the Guidelines should have been applied in their entirely to Defendant Fanfan.

However, if the Court continues to apply *Blakely* to the Guidelines, the Guidelines cannot constitutionally be applied piecemeal as the Court did at Fanfan's sentencing. Such an application distorts the operation of the sentencing system in a manner that was not intended by Congress or the United States Sentencing Commission.

This Court's approach was explicitly rejected by the United States District Court for the District of Utah in *United States v. Croxford*, No. 2:02-CR-00302PGC, 2004 WL 1462111 (D. Utah June 29, 2004), and is inconsistent with longstanding Supreme Court precedent on the severability of unconstitutional provisions. When portions of a statute are deemed unconstitutional, the remaining sections can be applied only if the Legislature would have enacted those provisions independent of the invalid provisions. *Alaska Airlines v. Brock*, 480 U.S. 678, 684-85 (1987); *Regan v. Time, Inc.*, 468 U.S. 641, 652-53 (1984); *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) ; *United States v. Jackson*, 390 U.S. 570, 585 (1968). "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently." *Alaska Airlines*, 480 U.S. at 684, *see also Hill v. Wallace*, 259 U.S. 44, 70-72 (1922) (Future Trading Act held nonseverable because valid and invalid provisions so intertwined that the Court would have to rewrite the law to allow it to stand). Most importantly, the Supreme Court has held that for a provision to be severed, the remaining portion of the statute must function "in a manner consistent with Congressional intent." *Alaska Airlines*, 480 U.S. at 685.

As the court correctly pointed out in *Croxford*, the provisions of the United States Sentencing Guidelines can not be selectively applied and still function consistent with the legislative intent. *Croxford*, 2004 WL 1462111 at *10-*11. "The Guidelines . . . are a holistic system, calibrated to produce a fair sentence by a series of both downward *and* upward adjustments. As the Guidelines themselves explain, 'The Guidelines Manual in effect on a particular date shall be applied *in its entirety*.' U.S.S.G. § 1B1.11." *Croxford*, 2004 WL 1462111 at *10. Judge Cassell further noted that "[t]o look at only one half of the equation would inevitably tug downward on criminal sentences, perhaps producing sentences that do not provide just punishment or protect public safety." *Id.*

Since it was clear error for the Court to sever out and not apply the relevant conduct and role in the offense sections of the guidelines, Defendant Fanfan's sentence should be vacated and the matter should be rescheduled for a further sentencing proceeding.

Dated in Portland, Maine, this 7th day of July, 2004.

Respectfully submitted,

/s/ Hélène Kazanjian
Assistant United States Attorney
United States Attorney's Office

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

Criminal No. 03-47-P-H

UNITED STATES OF AMERICA

v.

DUCAN FANFAN, DEFENDANT

NOTICE OF APPEAL

Notice is given that the United States of America, pursuant to the provisions of 18 U.S.C. §3732(b), hereby appeals to the United States Court of Appeals for the First Circuit from the sentence and judgment of the District Court entered orally in this matter on June 28, 2004 (Docket Entries, item no. 98) and entered on the docket on June 30, 2004 (Docket Entries, item no. 102); and from the order denying the motion to correct sentence entered on the docket on July 8, 2004 (Docket Entries, item no. 104).

Dated at Portland, Maine this 16th day of July 2004.

PAULA D. SILSBY

UNITED STATES
ATTORNEY

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 04-1946

UNITED STATES OF AMERICA

v.

DUCAN FANFAN

DOCKET ENTRY

DATE	PROCEEDING
7/19/04	CRIMINAL CASE docketed. Opening forms sent. Notice of Appeal filed by Appellant US. Appearance from due 8/2/04. Docketing Statement due 8/2/04. Transcript Report/Order due 8/2/04. [04-1946] (karn)

* * * * *

APPENDIX I

STATUTORY APPENDIX

1. The Due Process Clause of the United States Constitution, Amendment V, provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

2. The Jury Trial Clause of the United States Constitution, Amendment VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *.

3. Section 3553 of Title 18 of the United States Code, titled "Imposition of a Sentence," provides, in relevant part, as follows:

> **(a) Factors to be considered in imposing a sentence.**—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.—

(1) In general.—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.—

(A) Sentencing.—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sen-

tence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance

of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

* * * * *

4. Section 3742 of Title 18 United States Code, titled "Review of a sentence," provides as follows:

(a) Appeal by a defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea agreements.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) Record on review.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) Decision and disposition.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) Sentencing upon remand.—A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) Application to a sentence by a magistrate judge.—An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) Guideline not expressed as a range.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) Definitions.—For purposes of this section—

(1) a factor is a "permissible" ground of departure if it—

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

5. Section 841(a) and (b) of Title 21 of the United States Code, titled "Prohibited Acts A," provides, in relevant part, as follows:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * * * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of

imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * * * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment

which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

* * * * *

6. Section 991 of Title 28 of the United States Code, titled "United States Sentencing Commission; establishment and purposes," provides, in relevant part, as follows:

* * * * *

(b) The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

* * * * *

7. Section 994 of Title 28 of the United States Code, titled "Duties of the Commission," provides, in relevant part, as follows:

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

* * * * *

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not

exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

8. United States Sentencing Guidelines § 1B1.1, titled "Application Instructions," provides, in relevant part, as follows:

Except as specifically directed, the provisions of this manual are to be applied in the following order:

(a) Determine, pursuant to § 1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. See § 1B1.2.

(b) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.

(c) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

(d) If there are multiple counts of conviction, repeat steps (a) through (c) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

(e) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.

(f) Determine the defendant's criminal history category as specified in Part A of Chapter Four.

Determine from Part B of Chapter Four any other applicable adjustments.

(g) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.

(h) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

(i) Refer to Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.

* * * * *

9. United States Sentencing Guidelines § 1B1.3, titled "Relevant Conduct (Factors that Determine Guideline Range)," provides, in relevant part, as follows:

(a) *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) *Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).* Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

* * * * *

10. United States Sentencing Guidelines § 2D1.1, titled "Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy," provides, in relevant part, as follows:

(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if the defendant receives an adjustment under § 3B1.2 (Mitigating Role), the base offense level under this subsection shall be not more than level 30.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

(3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.

(4) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under § 3B1.2 (Mitigating Role), increase by 2 levels.

(5) (Apply the greater):

(A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

(B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to (I) human life other than a life described in subdivision (C); or (II) the environment, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.

(C) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.

(6) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

* * * * *

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
(1) •30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); •150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •1.5 KG or more of Cocaine Base;	Level 38
* * * * *	
(2) •At least 10 KG but less than 30 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 36

•At least 500 G but less than 1.5 KG of Cocaine Base;	
* * * * *	
(3) •At least 3 KG but less than 10 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 150 G but less than 500 G of Cocaine Base;	Level 34
* * * * *	
(4) •At least 1 KG but less than 3 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 50 G but less than 150 G of Cocaine Base;	Level 32
* * * * *	
(5) •At least 700 G but less than 1 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 3.5 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 35 G but less than 50 G of Cocaine Base;	Level 30

* * * * *

(6)	•At least 400 G but less than 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 20 G but less than 35 G of Cocaine Base;	Level 28

* * * * *

(7)	•At least 100 G but less than 400 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 500 G but less than 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 5 G but less than 20 G of Cocaine Base;	Level 26

* * * * *

(8)	•At least 80 G but less than 100 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 400 G but less than 500 G of Cocaine (or the equivalent a mount of other Schedule I or II Stimulants); •At least 4 G but less than 5 G of Cocaine Base;	Level 24

* * * * *

(9)	•At least 60 G but less than 80 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 300 G but less than 400 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 3 G but less than 4 G of Cocaine Base;	Level 22

* * * * *

(10)	•At least 40 G but less than 60 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 200 G but less 300 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 2 G but less than 3 G of Cocaine Base;	Level 20

* * * * *

(11)	•At least 20 G but less than 40 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 100 G but less than 200 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 1 G but less than 2 G of Cocaine Base;	Level 18

* * * * *

(12)	•At least 10 G but less than 20 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 50 G but less than 100 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 500 MG but less than 1 G of Cocaine Base;	Level 16

* * * * *

(13)	•At least 5 G but less than 10 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 25 G but less than 50 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 14

•At least 250 MG but less than 500 MG of Cocaine Base;

* * * * *

(14)	•Less than 5 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •Less than 25 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •Less than 250 MG of Cocaine Base;	Level 12

* * * * *

* Notes to Drug Quantity Table:

(A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

* * * * *

(D) "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

* * * * *

(F) In the case of Schedule I or II Depressants, Schedule III substances (except anabolic steroids), Schedule IV substances, and Schedule V substances, one "unit" means one pill, capsule, or tablet. If the substance is in liquid form, one "unit" means 0.5 gm.

* * * * *

11. United States Sentencing Guidelines § 3B1.1 titled "Aggravating Role," provides, in relevant part, as follows:

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

* * * * *

12. United States Sentencing Guidelines § 3C1.1 titled "Obstructing or Impeding the Administration of Justice," provides, in relevant part, as follows:

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

* * * * *

13. United States Sentencing Guidelines § 6A1.3 titled "Resolution of Disputed Factors (Policy Statement," provides as follows:

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(c)(1), Fed. R. Crim. P.

Commentary

In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a highly specific or required sentencing consequence. This situation no longer exists under sentencing guidelines. The court's resolution of disputed sentencing factors usually has a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair.

Although lengthy sentencing hearings seldom should be necessary, disputes about sentencing factors must be resolved with care. When a dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. See, e.g., United States v. Ibanez, 924 F.2d 427 (2d Cir. 1991). An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See, e.g., United States v. Jimenez Martinez, 83 F.3d 488, 494-95 (1st Cir. 1996) (finding error in district court's denial of defendant's motion for evidentiary hearing given questionable reliability of affidavit on which the district court relied at sentencing); United States v. Roberts, 14 F.3d 502, 521(10th Cir. 1993) (remanding because district court did not hold evidentiary hearing to address defendants' objections to drug quantity determination or make requisite findings

of fact regarding drug quantity); see also, United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. See 18 U.S.C. § 3661; see also United States v. Watts, 117 S. Ct. 633, 635 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court's consideration of acquitted conduct); Witte v. United States, 515 U.S. 389, 399-401 (1995) (noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a criminal trial, including information concerning criminal conduct that may be the subject of a subsequent prosecution); Nichols v. United States, 511 U.S. 738, 747-48 (1994) (noting that district courts have traditionally considered defendant's prior criminal conduct even when the conduct did not result in a conviction). Any information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy. Watts, 117 S. Ct. at 637; Nichols , 511 U.S. at 748; United States v. Zuleta-Alvarez, 922 F.2d 33 (1st Cir. 1990), cert. denied, 500 U.S. 927 (1991; United States v. Beaulieu, 893 F.2d 1177 (10th Cir.), cert. denied, 497 U.S. 1038 (1990). Reliable hearsay evidence may be considered. United States v. Petty, 982 F.2d 1365 (9th Cir. 1993), cert. denied, 510 U.S. 1040 (1994); United States v. Sciarrino, 884 F.2d 95 (3d Cir.),

cert. denied, 493 U.S. 997 (1989). Out-of-court declarations by an unidentified informant may be considered where there is good cause for the nondisclosure of the informant's identity and there is sufficient corroboration by other means. United States v. Rogers, 1 F.3d 341 (5th Cir. 1993); see also United States v. Young, 981 F.2d 180 (5th Cir.), cert. denied, 508 U.S. 980 (1993); United States v. Fatico, 579 F.2d 707, 713 (2d Cir. 1978), cert. denied, 444 U.S. 1073 (1980). Unreliable allegations shall not be considered. United States v. Ortiz, 993 F.2d 204 (10th Cir. 1993).

The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.